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11 Attorneys for Defendants K-M Industries
 12 Holding Co. Inc.; K-M Industries Holding Co.
 13 Inc. ESOP Plan Committee; and CIG ESOP
 14 Plan Committee

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

11 THOMAS FERNANDEZ, LORA SMITH 12 and TOSHA THOMAS, individually and on 13 behalf of a class of all others similarly 14 situated,	11) Case No. C06-07339 CW 12) 13) DECLARATION OF TERENCE F. 14) YOUNG ESTABLISHING THAT 15) INFORMATION DESIGNATED BY 16) NORTH STAR TRUST COMPANY IN 17) SUPPORT OF ITS MOTION FOR 18) SUMMARY JUDGMENT IS 19) SEALABLE 20) 21) CIVIL LOCAL RULE 79-5(d) 22)
14 Plaintiffs, v. 15 K-M INDUSTRIES HOLDING CO., INC., 16 <i>et al.</i> ,	14) 15) 16) 17) 18)
17 Defendants.	17) 18)

19 I, Terence F. Young, declare:

20 1. I am an attorney licensed to practice in the State of California and before this Court.
 21 I am associated with Lovitt & Hannan, Inc., attorneys for Defendants K-M Industries Holding Co.
 22 Inc., K-M Industries Holding Co. Inc. ESOP Plan Committee, and CIG ESOP Plan Committee (the
 23 “KMH defendants”) in this matter. I have custody of the relevant files of Lovitt & Hannan, Inc.
 24 related to this action and am familiar with the contents thereof. I make this declaration pursuant to
 25 L.R. 79-5(d) to establish that certain documents designated by defendant North Star Trust

1 Company ("North Star") to be confidential and submitted by North Star in support of its Motion for
2 Summary Judgment should be sealed and not made part of the Court's public files.

3 2. K-M Industries Holding Co. Inc. ("KMH") is a privately-held corporation comprising
4 two operating subsidiaries, Kelly-Moore Paint Company and Capital Insurance Group. Prior to
5 1999, KMH was known as Kelly Moore Paint Co., Inc. KMH maintains its financial and accounting
6 records and other materials related to its operation and operating results in strictest confidence and
7 treats such matters as trade secrets. KMH's shares are not traded publicly and the estimated value of
8 those shares is likewise a closely-guarded trade secret of KMH. Both of KMH's subsidiaries are
9 engaged in highly-competitive industries. Revealing KMH's confidential information in the public
10 records of this Court potentially could harm the privacy interests of KMH and put it and its
11 subsidiaries at a competitive disadvantage.

12 3. Plaintiffs' claims in the captioned lawsuit are premised on alleged violations of
13 Employee Retirement Income Security Act ("ERISA"). In the context of such litigation, the courts
14 have established that certain communications between ERISA Plan administrators, acting as
15 fiduciaries, and the attorneys retained by them, that normally would be protected from discovery by
16 the attorney-client privilege, are subject to a "fiduciary exception" to that privilege. As a
17 consequence, the attorney-client privilege does not bar the discovery by Plan beneficiaries, such as
18 plaintiffs in this action, of otherwise privileged communications. *United States v. Mett*, 178 F.3d
19 1058, 1063 (9th Cir. 1999). Communications subject to the fiduciary exception retain their
20 privileged status as to anyone other than the fiduciary and the beneficiaries. Some documents and
21 declarations submitted by the KMH defendants in support of their motion for summary judgment
22 were produced in discovery in this matter because they were subject to the fiduciary exception.
23 Nevertheless, the KMH defendants continue to claim privilege as to such documents and testimony
24 and continue to assert a claim of privilege as to anyone other than defendants and plaintiffs in this
25 lawsuit.

1 4. Among the issues raised by plaintiffs are claims primarily related to independent
2 appraisals of the value of KMH's shares performed at the time of the formation of the ESOPs that
3 are the subject of the lawsuit and more recently. Said appraisals were performed to value shares that
4 are not traded publicly and were based on financial results that are not made publicly available by
5 KMH.

6 5. Listed below are descriptions of the portions of the exhibits filed under seal by North
7 Star in support of its motion for summary judgment and the basis for KMH's claim that portions of
8 such exhibits either are confidential. Only four of the exhibits submitted by North Star were
9 designated as confidential by the KMH defendants. The remainder were designated as confidential
by plaintiffs.

10 6. North Star mistakenly submitted additional documents as exhibits to its motion for
11 summary judgment without designating them as to be filed under seal notwithstanding that they
12 were designated as Confidential by KMH in the course of discovery. Such documents also contain
13 sensitive financial and market information which KMH maintains as strictly confidential and the
14 release of which to the general public and competitors could negatively affect KMH's competitive
15 advantage. KMH has informed North Star of this failure to submit such documents under seal.
16 North Star has agreed to take action to correct the problem. I will be submitting a separate
17 declaration in connection with North Star's motion to seal such additional documents.

18 7. Except as set forth below, and except as will be set forth in the supplemental
19 designation to be submitted by North Star, the KMH defendants withdraw their claims of
20 confidentiality and/or privilege as to the documents designated as privileged by North Star in
21 support of its motion for summary judgment.

22 8. **North Star Exhibit No. 66.**

23 Exhibit 66 comprises excerpts of the Deposition of John Hommel, Senior Vice President of
24 North Star Trust Company. Taken in this matter on May 8, 2008. In its Administrative Motion for
25

1 an Order to File Documents Under Seal, North Star has designated numerous pages of the Hommel
 2 Deposition as confidential. The designated pages are: pp. 182-183, 201-202, 212-213, 223-225,
 3 243, 253-254, 257-258, 259-260, 262, 265-266, 271-275, 277, and 283-285. The KMH Defendants
 4 withdraw their confidentiality designation as to all but portions of pages 202, line 3 and page 260,
 5 lines 2-3. Attached hereto as Exhibit A is a true and correct copy of said pages with the confidential
 6 information redacted. The portions of the answers that are confidential relate to the subject of
 7 financial effects of litigation against KMH by plaintiffs claiming personal injuries from exposure to
 8 asbestos. Repeating the exact nature of those statements in this declaration would defeat the purpose
 9 of maintaining their confidentiality. KMH has carefully maintained the confidentiality of its internal
 10 discussions of the financial effects of such litigation and continues to believe that the public
 11 revelation of such considerations would damage its public image and its business.

12 **9. North Star Exhibit No. 71 (entire exhibit).**

13 Exhibit 71 is a letter from Kelly-Moore Paint Company's attorney, Cheryl Mills, to its
 14 President on the subject of available insurance coverage for asbestos claims against the company. It
 15 was produced in this matter as subject to the fiduciary exception to the attorney-client privilege.
 16 Nevertheless, it is subject to the attorney-client privilege as to third parties and should not become
 17 part of the public record. (The same document was attached as Exhibit 2 to the Declaration of
 18 Joseph Cristiano in Support of Motion For Summary Judgment by Defendants K-M Industries
 19 Holding Co., Inc., K-M Industries Holding Co. Inc. ESOP Plan Committee and CIG ESOP Plan
 20 Committee.)

21 **10. North Star Exhibit No. 73 (entire exhibit).**

22 Exhibit 73 is a hand-written note reflecting the substance of a communication between
 23 Stephen Ferrari, CFO of Kelly-Moore Paint Company, and its attorney, Cheryl Mills. On December
 24 3, 2007, Judge Bernard Zimmerman held, in response to plaintiffs' motion to compel and after *in*
 25 *camera* review, that Exhibit 73 was subject to the fiduciary exception and, pursuant to that Order, it

1 was produced to plaintiffs. The document is, nevertheless, subject to the attorney-client privilege as
2 to third parties and should not become part of the public record. (The same document was attached as
3 Exhibit 3 to the Declaration of Stephen Ferrari in Support of Motion For Summary Judgment by
4 Defendants K-M Industries Holding Co., Inc., K-M Industries Holding Co. Inc. ESOP Plan
5 Committee and CIG ESOP Plan Committee.)

6 11. North Star also has redacted portions of its Memorandum of Points and Authorities in
7 Support of Motion for Summary Judgment based on claims of privilege and confidentiality. The
8 KMH defendants hereby request that the following two portions of the memorandum be excluded
9 from the public record.

10 12. **North Star Memorandum of Points and Authorities, page 12:17-12:18 and**
11 **12:22-12:23**

Attached hereto as Exhibit B is a true and correct copy of page 12 of the North Star Memorandum of Points and Authorities with the confidential information redacted. The two portions of the memorandum that are confidential relate to the subject of financial effects of litigation against KMH by plaintiffs claiming personal injuries from exposure to asbestos. Repeating the exact nature of those statements in this declaration would defeat the purpose of maintaining their confidentiality. KMH has carefully maintained the confidentiality of its internal discussions of the financial effects of such litigation and continues to believe that the public revelation of such considerations would damage its public image and its business.

20 I declare under penalty of perjury under the laws of the United States of America that the
21 foregoing is true and correct.

22 | DATED: July 2, 2008

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Terence F. Young

EXHIBIT A

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3 SAN FRANCISCO AND OAKLAND DIVISION

4 **CERTIFIED**
5 **COPY**

6 THOMAS FERNANDEZ, et al.,)
7 Plaintiffs,)
8 vs.) Case No.
9 K-M INDUSTRIES HOLDING CO., INC., et al.,) C-06-07339 CW
10 Defendants.)
11)
12)

13
14 VIDEOTAPED DEPOSITION OF JOHN HOMMEL
15 May 8, 2008
16 San Francisco, California
17
18
19
20
21
22 Reported by:
23 EMI ALBRIGHT
24 RPR, CSR No. 13042
25 Job No. 79903
1

1 years with the company and their various advisors
2 regarding the asbestos issues -- asbestos litigation,
3 Redacted asbestos, a lot of asbestos
4 meetings and discussions with various counsel as well as
15:23 5 company representatives.

6 Q Okay. Did you ever have meetings with an
7 attorney named Cheryl Mills?

8 A I don't recall specifically. I believe
9 it's a name that was earlier on.

15:23 10 Q When you say you believe that is a name
11 that is earlier on, what do you mean by that?

12 A I don't recall specifically meeting --
13 having met with her. But I think that's a name I may
14 have seen in some of the earlier documents.

15:23 15 Q Okay. Let me go ahead and show you a
16 couple of different documents. First can you take a
17 look at something that has been previously been marked
18 as Exhibit 75? Go ahead and take the time to page
19 through that document.

15:25 20 First question is have you seen that
21 document before?

22 A No, sir, not that I recall.

23 Q When you took over as successor trustee in
24 2003, did anyone from the company tell you that Cheryl
15:25 25 Mills had stated that a few big hits could throw any

1 been involved in similar issues in terms of dealing with
2 prospective liability with asbestos, **Redacted**

3 **Redacted** with other types of industrial claims and
4 industrial context. And they satisfied us based on
17:32 5 their answers that they did, in fact, have such
6 experience, both with some of the individuals with whom
7 we would be immediately dealing, and if need be that
8 they had additional resources within their broader team
9 that had some specific knowledge in these areas.

17:33 10 BY MR. JACKSON:

11 Q Specific knowledge as to asbestos
12 liability?

13 A In terms of contingent liabilities for
14 industrial types of claims and pending litigation --

17:33 15 Q I see.

16 A -- in general.

17 Q And did they tell you what they thought in
18 those due diligence meetings as to whether or not to
19 hire them, did anyone at Stout Risius tell you what they
17:33 20 thought as a general rule was the proper way to value
21 contingent liability -- contingent litigation liability?

22 MS. DILLER: Object to the form.

23 MR. PALMER: Object to the form.

24 A They reviewed with us their process in
17:33 25 terms of valuing and again looking to the facts and

1 STATE OF CALIFORNIA)
2 : ss)
3 County of Alameda)
4

5 I, the undersigned, a Certified Shorthand Reporter
6 of the State of California, do hereby certify: That the
7 foregoing proceedings were taken before me at the time and
8 place herein set forth; that any witnesses in the foregoing
9 proceedings, prior to testifying, were placed under oath;
10 that a verbatim record of the proceedings was made by me
11 using machine shorthand which was thereafter transcribed
12 under my direction; further, that the foregoing is an
13 accurate transcription thereof.

14 I further certify that I am not a relative,
15 employee, attorney or counsel of any party to this action or
16 relative or employee of any such attorney or counsel and that
17 I am not financially interested in the said action or the
18 outcome thereof;

19 IN WITNESS WHEREOF, I have this date subscribed my
20 name.
21 Dated: MAY 16 2008

EXHIBIT B

your ESOP may be affected adversely.

Exh. 91. Again, Plaintiffs Fernandez and Smith admit that they contemporaneously received this communication. Exh. 91; Exh. 77 at Interrog. Responses 1 and 2; *see also* Exh. 37 at 81:13-82:14. In addition, each year CIG provided all participants, including Plaintiffs Fernandez and Smith, with an annual ESOP statement, which showed the annual valuation reports' conclusions and applied those results to the participant's own interest in the Plan. *See, e.g.*, Exh. 92, 93, 42, 44, 46, 57.

The undisputed facts therefore belie the Complaint's allegation that "until the Fall of 2004, Defendant Fiduciaries intentionally withheld information about the extent of KMH's potential asbestos liability from participants who were active employees." *See* Complaint ¶ 52. In fact, contrary to the allegations of the complaint, each Plaintiff admits that they know of no facts to support the proposition that any defendants withheld information concerning Kelly-Moore's asbestos liability. Exhs. 37 at 195:2-13; Exh. 94 at 179:2-6; Exh. 88 at 208:1-12.

3. Resolution of the Asbestos Litigation

While the complaint criticizes the alleged failure of Defendants to have Kelly-Moore's asbestos litigation taken into consideration in the valuation of KMH's subsidiaries for purposes of the initial ESOP transactions, the asbestos issues never resulted in KMH's downfall. Redacted

Redacted the Company's auditors and the ESOP's
valuators believe the damage has been contained. Exh. 95 at 254:18 – 257:3; *see also* Exh. 3 at
SRR10811. In other words, while at one time management was concerned enough about the
asbestos litigation to discuss it with all shareholders (including Plaintiffs and the putative class),
subsequent events have led the Company to the determination **Redacted**
Redacted, a conclusion with which Kelly-Moore's and CIG's auditors and the ESOP's valuers
agree. *See, e.g.*, Exh. 3 at SRR10811; Exh. 95 at 256:17 – 257:3.

E. North Star's Conduct as the ESOP's Discretionary Trustee

North Star took an active role as trustee following its appointment in April 2003. It met with members of management and attended board and shareholder meetings to discuss the